PP

v.

TAN YU LEONG

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CRIMINAL TRIAL NO: (MT-1) 45-25-99]
4 MARCH 2002

EVIDENCE: *Statement - Cautioned statement - Admissibility - Voluntariness - Whether proved - Suspicious circumstances surrounding making of statement - Whether vitiating factors which affects voluntariness - Whether accused entitled to produce his own cautioned statement - Dangerous Drugs Act 1952, ss. 37A(1)(b) & 37A(2)*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Drug offence - Element of possession - Exclusive possession - Whether established - Knowledge of possession - Whether physical proximity amount to knowledge of possession - Absence of sufficient evidence - Whether there was a prima facie case against accused*

CRIMINAL PROCEDURE: *Trial - Prima facie case - Whether made out*

The accused was charged for being in possession of 99.7 grams of heroin and monoacethylmorphine under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The prosecution sought to tender a cautioned statement of the accused given at the place of incident (ID17). The counsel for the accused objected and adverted to another cautioned statement made by the accused (ID18) to one inspector a few days after the incident. The accused contended that the ID17 ought not to be admitted as it was not voluntarily made. Further, a question arose as to whether a *prima facie* case had been made out against the accused. The issues were (1) whether the accused was entitled to tender his own cautioned statement to support his version of the circumstances; (2) whether the offending drugs were found on the body of the accused; (3) whether exclusive possession was established and (4) whether there was presence of knowledge on the part of the accused.

Held:

[1] To deny the admission of ID18 would be procedurally unfair. The accused was entitled to give evidence, to call witness or to tender his own cautioned statement *ie*, ID18 to support his version of the circumstances relating to

the making of the cautioned statement in ID17. In ID18 the accused made no confession and instead exercised his right to give his statement in court. The caution in ID18 was made under s. 37A(1)(b) and s. 37A(2) of the Dangerous Drugs Act 1952 and was read and explained to the accused through an interpreter as compared to ID17 where there was no mention that the caution had been read and explained in Hokkien. Hence, a doubt existed as to whether or not the accused gave the statement in ID17 at the place of incident. The prosecution had failed to prove beyond a reasonable doubt that ID17 was voluntarily made by the accused and hence it was inadmissible. (pp 327 a-b, & 338 c-f)

[2] The evidence adduced by the prosecution clearly showed that the offending drugs were never found on his body or on any container carried out by him which would invariably rule out direct evidence. (p 340 f)

[3] For exclusive possession to be established the important ingredient that has to be proven by prosecution is knowledge – that the accused knew of the presence of the incriminating drugs in the car as adduced by the prosecution. An evaluation of the prosecution evidence revealed that at the time when the police arrested the accused he did not put up any struggle nor attempted to run away. The incriminating drugs were not found on the person of the accused but in the car of which the accused as the driver was in close proximity. The prosecution had proven physical proximity ie that as the driver of the car he was near the drugs but proximity alone does not amount to knowledge least of all possession. (p 341 f & g-h)

[4] The prosecution's failure to prove knowledge was further supported by the absence of evidence as to whether the packages and plastic bags had been dusted for fingerprints or whether the accused hands or fingernails clippings were examined for traces of the incriminating drugs. The failure by the prosecution in adducing such testing amounted to failure to abide by the best evidence rule and hence must be construed in favour of the accused.The prosecution had failed to prove a *prima facie* case at the close of the prosecution's case. (p 342 g)

[Accused acquitted and discharged without defence called.]

Case(s) referred to:
Chan Pean Leon v. PP [1956] 22 MLJ 239 ***(refd)***
Hasibullah Mohd Ghazali v. PP [1993] 4 CLJ 535 SC ***(refd)***
PP v. Gooi Loo Seng; PP [1993] 3 CLJ 1 ***(refd)***
PP v. Kadir Awang [1989] 2 MLJ 33 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Nor Bakar [2000] 2 AMR 2343 HC ***(refd)***

PP v. Mok Kar Poh [2001] 5 CLJ 206 ***(refd)***
PP v. Muhammad Nasir Shaharuddin & Anor [1994] 2 MLJ 576 ***(refd)***
PP v. Saimin & Ors [1971] 2 MLJ 16 ***(refd)***
PP v. Shee Chin Wah [1997] 5 CLJ 472 HC ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] 1 MLJ 132 ***(refd)***
Tan Chai Keh v. PP [1948-49] MLJ 105 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37A(1)(b), (2), 37(d), (g), (h)
Evidence Act 1950, s. 31A(1)

For the prosecution - Muhammad Ilmami Ahmad DPP
For the accused - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Syed Ahmad Helmy JC:
The accused herein was prosecuted before me upon the following charge:

> Bahawa kamu pada 25 Februari 1999 jam lebih kurang 6.15 petang di lorong belakang Pasaraya The Store, Taman Johor Jaya, dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim telah didapati mengedar dadah berbahaya iaitu 99.7 gram campuran heroin dan monoacetylmorphines (17.8 gram heroin dan 81.9 gram monacetylmorphines) dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

According to the evidence led by the prosecution principally through SP6, ASP Imran bin Abdul Rahman on 25 February 1999 at about 3pm he received information that a wrongful act would be committed by a male Chinese driving a yellow BMW in the road at the back of the The Store Supermarket (hereinafter called the Supermarket) at Taman Johor Jaya. Acting on the information received he led a party of police officers divided into two groups – group A comprising of himself Inspector Mazlan bin Morsidi, D/Kpl Abdul Khalid bin Ahmad, and D/Kpl Jayarajan a/l Philip Sundram (SP7) and Group B comprising of Inspector Zainal Murad bin Nasir and D/L/Kpl Mohd Arif bin Intai and kept surveillance and laid ambush at the site and the two roads – namely Jalan Dedap 12 and Jalan Dedap 14. At about 6.15pm he received a telephone call from Inspector Zainal Murad bin Nasir from Group B informing him that a yellow BMW No. JEE 3181 (the subject car) was seen along Jalan Dedap 14 heading towards the back road of the supermarket. He accordingly instructed the raiding party to get ready to execute the ambush. The subject car was driven into the parking area and parked in reverse with its rear facing the supermarket at the back road of the supermarket and SP6

instructed the raiding party to swing into action. The car comprising of the police party in Group A came alongside the subject car on the driver's side and the car of Group B came alongside the subject car on its front. SP6 then stood in front of the driver's seat door and identified himself to the accused. He directed the accused to get out of the subject car and conducted a bodily search on him. He then proceeded to conduct a search on the subject car in the presence of the accused who was guarded by SP7 and D/L/Kpl Mohd Arif bin Intai and found on the carpet floor on the footwell on the front passenger's seat a plastic bag (P13) which consists of a package wrapped in Chinese newspaper dated 15 February 1999 (P13A) and inside the newspaper package he found a plastic packet the contents of which (P13B) he suspected to be dadah. SP6 also found on the carpet floor on the footwell of the driver's seat a package wrapped in Chinese newspaper dated 21 February 1999 (P14) and inside it he found a plastic packet the contents of which (P14A) he suspected to be dadah.

His search on the dashboard reveals seven (7) plastic packets the contents of which (P14C DB1-DB7) he suspected to be dadah and also a registration book issued by Hospital Pakar Puteri Johor (P20) in the name of the accused. On the back passenger's seat was found a weighing machine bearing the name Tanita Electronik Digital Scale (P21) and a sealer bearing the name MEC (P22).

The various exhibits were then sent to the Government Chemist En. Ahmad Nazri bin Hussein (SP3) whose analysis confirms the 99.7 grams of heroin and monoacethylmorphine for which the accused is presently charged.

The evidence of SP6 goes on to state that when the search was conducted the accused appeared to be frightened and pale. A search list (P19) was then prepared by SP6 and signed by the accused. The testimony of SP6 was supported by the evidence of SP7.

In respect of the ownership of the subject car the prosecution led evidence through Mohamad Sulaiman Azyze bin Mohamad Salleh Azyze (SP5) that subject car was purchased by him on 23 September 1997 from one Mohd Izhar bin Ahmad. On 19 January 1998 he sold the subject car to one Ng Choon Meng (SP9) for RM125,000. On 3 February 1999 SP9 sold the subject car to the accused for RM115,000 and the accused had paid him a deposit of RM6,000.

I had earlier conducted a trial within a trial on the admissibility of the cautioned statement (ID17) of the accused, and it is appropriate at this juncture to lay out my reasons in rejecting the cautioned statement.

Cautioned Statement

The prosecution sought to tender the cautioned statement of the accused given at the place of incident which was marked as ID17 and upon the objection by accused counsel as to its admissibility a trial within a trial was conducted.

The prosecution tendered two witnesses in the trial within a trial namely the arresting officer ASP Imran bin Abdul Rahman (TWT-SP1) and D/Kpl Jayarajan a/l Philip Sundram (TWT-SP2). The defence evidence was proffered through the accused.

ASP Imran in his testimony stated that he read and explained the caution written by him in ID17 though D/Kpl Jayarajan (TWT-SP2) who translated it to the accused in Hokkien. The accused acknowledged that he understood the caution and the accused signed the cautioned statement as appears in the middle left of the 1st page of ID17. The signature of TWT-SP1 and TWT-SP2 also appears in the middle right and middle left respectively of the first page of ID17. Thereafter TWT-SP1 through the interpretation of TWT-SP2 in Hokkien recorded the question and answers of the accused. The accused was co-operative and appended his signature on the cautioned statement.

Learned counsel for the defence at the very beginning of his cross-examination of TWT-SP1 adverted to another cautioned statement made by the accused on 3 March 1999 to Inspector Che Noorhayati binti Che Onn and requested for its production to be marked as a defence exhibit. The prosecution objected to its production and contended that it cannot be admitted at the stage of a trial within a trial. If at all the defence requires its admission it must be done though the investigating officer or the recording officer or for that matter the accused at the main trial and referred to the case of *PP v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285. Learned counsel for the accused argued to the contrary and relying on the case of *Lin Lian Chen (supra)* and the Evidence Act 1950 submitted that the second cautioned statement could be admitted through the arresting officer aside from the recording officer.

As a result of the principle established in *Lin Lian Chen*'s case *(supra)* an amendment Act 851 was made to s. 31A(1) of the Evidence Act which amendment stipulates that a statement by the accused person can only be admitted through the recording officer or the accused. Nevertheless a subsequent amendment was made to the Evidence Act through Act A 978 which took effect from 31 January 1997. The latest amendment has the effect of reverting to the position of the principle as established in *Lin Lian Chen*'s case *(supra).*

Upon hearing the respective submissions aforesaid I ruled that the second cautioned statement was admissible though the arresting officer and accordingly admitted same as defence exh. D18. It is my considered view that to deny the admission of ID18 through the arresting officer would be procedurally unfair within the views as propounded by the Supreme Court in *Lin Lian Chen*'s case *(supra)* in that an accused is entitled to give evidence, to call witness or to tender his own cautioned statement (in the context herein D18) to support his version of the circumstances relating to the making of the cautioned statement in ID17.

The accused in his testimony under oath denied making the cautioned statement at the place of incident and avers that he signed same together with several other documents including the search list whilst being handcuffed at the police station at the request of ASP Imran. It is his evidence that no caution was read or explained to him nor was he notified of his rights to remain silent and give his statement in court. It was also the accused evidence that the police used force on him at the place of incident which made him frightened and embarrassed. In particular ASP Imran pulling his shirt at the chest which frightened and embarrassed him. He denied knowledge of the incriminating drugs recovered from the three places mentioned above. In cross-examination much was made out by the prosecution of the entry of his employment as a carpenter in D18 which was different from that as stated in ID17 as a second hand car dealer but nevertheless it was explained by the accused in re-examination that it was because he was not in possession of a second hand car dealer's licence and the accused reiterated that the force executed by pulling his shirt frightened him and the caution was never read or explained to him. He emphasised that he only understands a little bit of Hokkien and hence does not understand the caution which was translated to him in Hokkien.

In the light of the evidence of both the prosecution and the accused it is the accused contention that the cautioned statement ID17 ought not to be admitted as it was not made by the accused at the place of the incident and if it was made, it was not voluntarily made or was made in circumstances which were undesirable thus vitiating its voluntariness.

Coming to the first contention on whether the accused made the statement as reflected in ID17 at the place of the incident there appears to be two versions – the prosecution's version that the statement was made at the place of the incident after ASP Imran read and explained the caution which was interpreted in Hokkien by D/Kpl Jayarajan and the accused's version that he never made the statement at the place of incident though he admitted signing ID17 together with other documents including the search list at the police station.

a It is trite law that where a set of facts gives rise to two inferences, the inference most favourable to the accused ought to be given – *Tan Chai Keh v. PP* [1948-49] MLJ Supp 105. The onus on the prosecution in the face of the contrasting versions, is to prove beyond reasonable doubt that the prosecution's version is true which to my mind the prosecution has failed to do. I say so because the b existence of exh. D18 creates a doubt and hence a stumbling block to the prosecution's version.

The cautioned statement in the form of D18 which I had ruled was admissible through ASP Imran was the second cautioned statement made by the accused on 3 March 1999 (subsequent to ID17) to Inspector Che Noor Hayati binti c Che Onn at the Police Station. In D18 the accused made no confession and instead exercised his right to give his statement in court. The caution in D18 was made under s. 37A(1)(b) and s. 37A(2) of the Dangerous Drugs Act 1952 and was read and explained to the accused through an interpreter as compared to ID17 where there was no mention that the caution had been read and d explained in Hokkien.

Further it should be borne in mind that the version of the accused that ID17 was signed together with the search list and other documents at the police station which signature of the search list was confirmed by ASP Imran would go towards showing that the accused version was not improbable.

e

Hence by reason thereof a doubt exists whether or not the accused gave the statement in ID17 at the place of incident which leads me to conclude that the prosecution has failed to prove beyond reasonable doubt that ID17 was voluntarily made by the accused and hence inadmissible.

f

On the point of admissibility I am minded of the principle established by the Supreme Court in *Hasibullah bin Mohd Ghazali v. PP* [1993] 4 CLJ 535 that in deciding the issue of admissibility of a confession the onus is not on the accused to show involuntariness but on the prosecution to prove beyond any reasonable doubt that the confession was voluntary.

g

Thus where it was not voluntarily made or made in circumstances which were undesirable which vitiates its voluntariness the courts have consistently rejected the admissibility of the cautioned statement – see *PP v. Muhammad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576; *PP v. Mohd Nor bin Bakar* [2000] h 2 AMR 2343; *Hasibullah bin Mohd Ghazali v. PP (supra).*

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The factual pattern herein clearly shows that the vitiating factors as borne out by the accused's version is not incredible. He was forthright in his evidence as to create doubt as to the credibility of his version bearing in mind that the accused was not discredited in any material manner. The version of the accused that the police "bertindak kasar" at or about the time of his arrest and being dragged out of the car by his shirt at the chest area by ASP Imran, being handcuffed which placed him in a frightened state are clear pointers of the vitiating factors present which adversely affects the voluntariness of ID17 and as stated above there is nothing incredible in the accused version and the principle established in *Tan Chai Keh* above behoves upon me to adopt the inference most favourable to the accused.

Before concluding I wish to address the issue of whether or not the prosecution has adduced evidence of the rank of ASP Imran being that of or above that of an Inspector. This contention by the defence is a non-issue by reason of the circumstances relating to the recording of the evidence of ASP Imran in the trial within a trial.

Though ASP Imran did not relate the rank he was holding at the time in the trial within a trial nevertheless the accused acknowledge that it was ASP Imran who asked him to sign ID17 and the ASP Imran was identified by him in court – hence there is ample evidence of his rank as an ASP.

Furthermore in this case at the point when defence counsel requested for a trail within a trial to be conducted in respect of ID17 the prosecution did inquire whether the evidence of ASP Imran (TWT-SP1) could be continued from the point the objection was raised and since the defence concurred, the rank of ASP Imran as given in the main trial invariably forms part of the evidence in the trial within the trial and hence the accused counsel's objection on this score cannot be acceded to – *PP v. Kadir bin Awang* [1989] 2 MLJ 33.

Against the background aforesaid at the close of the prosecution's case I found that the prosecution has failed to prove a *prima facie* case on the charge against the accused and I accordingly acquitted and discharged him without calling for his defence for the reasons hearinafter following:

The onus placed on the prosecution at the close of the prosecution's case is to prove a *prima facie* case.

As was held by her Ladyship Zainun bt Ali in *PP v. Mok Kar Poh* [2001] 5 CLJ 206 at pp. 209-210 "a *prima facie* case though not conclusive, is a case which is sufficient to call for an answer. It is incumbent in such an instance, that there be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence that has been filtered and which has gone

through the process of evaluation. *Prima facie* evidence thus is evidence which is not inherently credible and which if not unrebutted would warrant a conviction".

The question for determination is whether on the evidence adduced thus far by the prosecution has adduced evidence which is not inherently credible and which if unrebutted would warrant a conviction.

To support a *prima facie* case the prosecution has to prove the element of possession of the offending drugs by the accused was exclusive.

Though the drugs were found in the car nevertheless the presumption appearing in ss. 37(d), (g) and (h) of the Dangerous Drugs Act 1952 is clearly inapplicable. This is because the operative words in s. 37(d) namely "anything whatsoever'' has been ruled not to include a car – see *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132. Again the statutory presumptions in s. 37(h) of the Act would only arise if the drugs are found concealed in a specially constructed compartment. *PP v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285 and lastly the presumption in s. 37(g) does not apply because a car does not account to premises.

In the absence of the applicability of any of the statutory presumptions aforesaid the mode of proving exclusive possession would be either by way of direct evidence or circumstantial evidence.

The evidence adduced by the prosecution clearly shows that the offending drugs were never found on his body or on any container carried out by him which would invariably rule out direct evidence. Thus the prosecution's case revolves primarily on circumstantial evidence of possession.

Adverting to the question of possession Thomson J in the case of *Chan Pean Leon v. PP* [1956] 22 MLJ 239 gave an invaluable elucidation of the word:

> 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition, page 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

> To put it otherwise there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on the table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shows such an intention ... But there must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.

Thus from the aforesaid or possession to be made out there must be a physical and mental element.

From the evidence adduced of the facts if falls short of proving exclusive possession by the accused of the drugs found in the car.

For exclusive possession to be established the important ingriedient that has to be proven by prosecution is knowledge – that the accused knew of the presence of the incriminating drugs in the three places in the car as adduced by the prosecution.

An evaluation of the prosecution evidence reveals that at the time when the police arrested the accused he did not put up any struggle nor attempted to run away. The incriminating drugs were not found on the person of the accused but in the car of which the accused as the driver was in close proximity. In such circumstances can the mere fact that he was the sole occupant of the motor car being the driver and hence in charge of it be sufficient evidence that that the accused was in custody and control of the incriminating drugs. It must be borne in mind that the accused ownership of the motor car has not been proven by the prosecution for the inference that he must have been in custody and control of the drugs to be made.

On the question of ownership though it is true that there is evidence to the effect that SP9 sold the car to the accused on 3 February 1999 however what is rather baffling is the order of the magistrate releasing and returning the car to SP5 on 29 June 1999. If the ownership of the car in favour of the accused has as contended by the prosecution been proven by SP9 then the car ought not to be ordered to be returned to SP5. Further the evidence of SP4 the JPJ officer confirms that car was on 12 July 2001 registered in the name of the SPS's wife – Puan Fadzillah binti Yaacob which leads to the inference that it remained registered in the name of SP5 until it was transferred to his wife on 12 July 2001. This important aspect was never explained by the prosecution. Again on the ownership question the evidence of SP9 would point towards the accused being in the business of a second hand car dealer on or about February 1999. SP9 categorical evidence that the accused told him that he would sell the car if the price is right is supportive of the accused vocation as a second hand can dealer at the relevant time and hence it is incumbent upon the investigation officer to conduct further investigation to determine whether others had access to driving the car before or on the date in question – the failure of which would raise a serious doubt of the accused ownership of the car.

From the evidence as presented I am of the view that at the very most the prosecution has proven is physical proximity in the sense that as the driver of the car he was near the drugs but proximity alone does not amount to knowledge least of all possession. A plethora of cases would support such proposition – See *Lin Lian Chen v. PP* and *PP v. Mok Kar Poh (supra)*. Knowledge must be actual knowledge – *PP v. Teoh Lay Hock* in Johor Bahru High Court Perbicaraan Jenayah 45-38-98. Proximity *per se* cannot be equated to possession – see *PP v. Teo Boon Kee* – in Johor Bahru High Court Perbicaraan Jenayah 58-28-88.

The prosecution's failure to prove knowledge is further supported by the absence of evidence as to whether the packages and plastic bags had been dusted for fingerprints or whether the accused hands or fingernails clippings were examined for traces of the incriminating drugs – of *PP v. Lin Lian Chen (supra)*. The failure by the prosecution in adducing such testing amounts to a failure to abide by the best evidence rule and hence must be construed in favour of the accused.

In the face of the nature of the evidence as proffered by the prosecution aforesaid it is incumbent upon the court to examine the evidence from all angles – see *PP v. Gooi Loo Seng v. Public Prosecutor* [1993] 3 CLJ 1; *PP v. Shee Chin Wah* [1997] 5 CLJ 472.

In examining the evidence from the several angles invariably the examination of the evidence from the angle that the accused was a second hand dealer and hence in all probabilities the car in which the incriminating drugs were found could be driven by others for purpose of a test drive cannot be avoided.

This court is minded that the burden of proof lies on the prosecution to prove a *prima facie* case and curiosity to know what accused has to say is not and cannot be sufficient to call for the defence – see *PP v. Saimin & Ors* [1971] 2 MLJ 16.

By reason of the aforesaid it is my judgment that the prosecution has failed to prove a *prima facie* case at the close of the prosecution's case and I accordingly acquitted and discharge the accused without calling for the defence.